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Honorable John L. Burton
205 State Capitol

TALENT AGENCIES - #22966

Dear Senator Burton:

You have asked whether amendments proposed by the Association of Talent Agents to rules, mutually agreed upon by the Association of Talent Agents and the Screen Actors Guild, governing representation of actors by talent agencies violate Chapter 4 (commencing with Section 1700) of Part 6 of Division 2 of the Labor Code.

Chapter 4 (commencing with Section 1700) of Part 6 of Division 2 of the Labor Code[1] (hereafter Chapter 4) provides that "[n]o person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner" (Sec. 1700.5). A "talent agency" is "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists" (subd. (a), Sec. 1700.4). An "artist," in turn, includes a broad spectrum of persons working in the entertainment field (subd. (b), Sec. 1700.4).

Chapter 4 governs the licensing of talent agencies and specifies requirements for the operation and management of talent agencies. These requirements include the approval of contract forms by the Labor Commissioner (Sec. 1700.23), the filing of fee schedules (Sec. 1700.24), the maintenance of specified records (Sec. 1700.26), prohibitions against sending artists to certain places (Secs. 1700.33 and 1700.34), and certain disclosures (Secs. 1700.24 and 1700.40). Chapter 4 prohibits a talent agency from selling or transferring to any person other than a director, officer, manager, employee, or shareholder of the talent agency any interest in or the right to participate in the profits of the talent agency without the written consent of the Labor Commissioner (Sec. 1700.30). Chapter 4 also prohibits a talent agency from dividing fees with an employer, agent, or other employee of an employer (Sec. 1700.39).

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[1] All subsequent section references are to the Labor Code, unless indicated otherwise.

The Labor Commissioner is authorized to adopt rules and regulations reasonably necessary for the purpose of enforcing and administering Chapter 4 (Sec. 1700.29; see 8 Cal. Code Regs. 12000 and following).

The purpose of Chapter 4 was discussed by the court in *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th 246, 253 (hereafter *Waisbren*). The court stated that Chapter 4 is a remedial statute, designed to correct long-recognized abuses, which was enacted for the protection of those seeking employment as artists (Id., at p. 254, quoting *Buchwald v. Superior Court* (1967) 254 Cal.App.2d 347, 350-351). Consequently, Chapter 4 "should be liberally construed to promote the general object sought to be accomplished ...." (Ibid.).

You have informed us that, in addition to the regulatory scheme provided by Chapter 4, a private, quasi-regulatory relationship exists between film actors, represented by the Screen Actors Guild (hereafter SAG), and talent agents, represented by the Association of Talent Agents (hereafter ATA). This relationship is governed by a set of mutually approved rules known as "Agency Regulations," the pertinent portions of which you have provided us. The Agency Regulations currently in effect provide, among other things, that an entity that produces or distributes motion pictures, or owns any interest in any company that does so, may neither own any direct or indirect interest in an agent or the agent's debt nor may it share in an agent's profits (Subd. A, Sec. XVI, Agency Regulations). Conversely, an agent or an owner of an interest in an agent may not produce or distribute motion pictures nor own any direct or indirect interest in a company that does so (Subd. B, Sec. XVI, Agency Regulations). Finally, you have informed us that the ATA seeks to amend these provisions, as follows:

> "Conform applicable provisions
> "Add the following:
> "1. An agent shall not be a motion picture producer.
> "2. Major Studios and Networks (i.e., Warner Bros., Universal, Disney, Miramax, Sony Pictures, Dreamworks, Fox, MGM, New Line, Paramount, ABC, CBS, NBC, FBC, WB, and UPN) may not own an interest in an agent. An agent may not own any interest in any Major Studio or Network (see above). Such prohibition shall include any parent entity of such Major Studios and Networks and shall include all subsidiaries of such parent entities. SAG and ATA shall establish a standing committee to recommend from time to time to SAG and ATA the addition of entities which have become Major Studios and Networks after the effective date of this proposal. The prohibition in this paragraph 2 is absolute and not diminished in any way by the operation of paragraph 3, 4, or 5.
> "3. An agent may not own a controlling interest in a company engaged in production and a company engaged in production may not own a controlling interest in an agency. 'Control' means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a

company, whether through ownership of voting stock, by contract or otherwise, and in all events includes the ownership of an economic interest greater than 49% in such company.

"4. A company that has an incidental interest in production may own any interest in an agent and an agent may own any interest in a company that has an incidental interest in production. Companies which have incidental interests in production include consumer product companies, technology companies and advertising companies, among others.

"5. An agent may own any interest in a company engaged in distribution subject to the requirements of this Section.

"6. In the event that any interest in an agent is transferred to any interested company the day to day management of the agency shall be the responsibility of franchised agents.

"7. In no event as a result of the transactions permitted under this Section shall an agent participate in employer decisions respecting the hiring or firing of actors (other than strictly in the agent's capacity as the representative of the actor and consistent with the agent's fiduciary duty to the actor).

"8. An agent contracting with an 'interested company' (under paragraph 3, 4 or 5) shall disclose the following in such contract:

"A. The agent is franchised by SAG and must comply with all provisions of the Basic Contract and Regulations; and the agent shall provide such to the interested company.

"B. The agent's paramount duty is to the actor with whom the agent's relationship is that of a fiduciary and to whom the agent owes a duty of loyalty as set [forth] in the Regulations.

"C. All dealings between the agent and the interested company must be at arm's length.

"D. In the event of any dispute between an actor and the interested company, the agent's sole duty will be to support the interests of the actor whom the agent represents.

"E. All communications between the actor and his agent are confidential, and except as are permitted by the Regulations, cannot be disclosed by the agent to the interested company.

"9. The agent shall obtain a representation and warranty from the interested company that it understands the agent's duties as disclosed and that it will not take any action to interfere with or coerce the agent in the performance of the agent's duties to the actor. SAG and the agent's clients will be express third party beneficiaries of that representation and warranty.

"10. Within thirty (30) days of contracting with an interested company, the agent shall provide SAG and its clients with:

"A. An appropriate disclosure specifying the interested company with which the agent has contracted; and

"B. either a copy of the contractual provisions making the required disclosures and constituting the necessary representation and warranty or an affidavit attesting that these requirements have been satisfied.

"11. Following disclosure pursuant to paragraph 10 above, the actor may within thirty (30) days after receipt of such disclosure terminate his agency contract. In such event, the agent shall be entitled to commission on employment contracts entered into prior to the date of termination.

"12. Following the aforesaid disclosure and the expiration of the aforesaid thirty (30) day termination period, if the actor believes the agent has dealt with an interested company in which the agent has a financial interest that is an employer or potential employer of the actor in contravention of the agent's fiduciary duty or duty of loyalty by reason of such financial interest, the actor may refer his claim to expedited arbitration. The arbitrator shall determine the claim within thirty (30) days of the arbitration hearing. If the arbitrator finds the actor's claims to be meritorious, the arbitrator may permit the actor to terminate his agency contract upon such terms and conditions as the arbitrator deems proper.

"13. The agent may not charge commission on compensation which the actor receives from direct employment by an interested company.

"14. Any agent which engages in a transaction with an interested company shall appoint a compliance officer who is charged with the responsibility to monitor the agent's compliance with its fiduciary responsibilities to its clients.

"15. Any agent desirous of participating in a financial interest transaction covered under paragraph 3, 4 or 5 above, shall financially participate in the creation of a fund to assist SAG's membership in broadening actor representation by agents.

"16. Create expedited arbitration and disciplinary proceedings specific to these provisions to address any breaches of these provisions.

"17. SAG and ATA shall commission a study respecting the effect of the revised financial interest rules. At any time after 3 years from the effective date of the revised financial interest rules, SAG or ATA can reopen this agreement respecting the revised financial interest rules to address changes for prospective transactions warranted by reason of the information derived from the study.

"18. To the extent an agent has a controlling interest in an interested company in accordance with this proposal, said agent will undertake liability for residuals (and any other liability which may be owing) to SAG and its members by such interested company.

"19. For purposes of this Section, the limits and requirements hereof shall apply to all areas of SAG's jurisdiction.

"Retain current paragraphs:
"A. Line 33 – beginning with 'However' through line 40
"B. Line 50 (p. 29) through line 5 (p. 30)
"C. Entire paragraphs C(2) – C(4)
"E. Entire paragraph
"F. Entire paragraph
"G. Entire paragraph – prospective only" (ATA Modified Proposal 5 Agents To Be Independent; hereafter ATA Proposal)

These proposed amendments relate primarily to the financial independence of agents with regard to ownership by agents in companies that produce or distribute motion pictures (paras. 3, 5, and 8, ATA Proposal) and, conversely, ownership by companies that produce or distribute motion pictures in agents (paras. 2, 4, and 6, ATA Proposal). Chapter 4 addresses these issues in the following provisions:

"1700.6. A written application for a license shall be made to the Labor Commissioner in the form prescribed by him or her and shall state:

"(a) The name and address of the applicant.

"(b) The street and number of the building or place where the business of the talent agency is to be conducted.

"(c) The business or occupation engaged in by the applicant for at least two years immediately preceding the date of application.

"(d) If the applicant is other than a corporation, the names and addresses of all persons, except bona fide employees on stated salaries, financially interested, either as partners, associates, or profit sharers, in the operation of the talent agency in question, together with the amount of their respective interests.

"If the applicant is a corporation, the corporate name, the names, residential addresses, and telephone numbers of all officers of the corporation, the names of all persons exercising managing responsibility in the applicant or licensee's office, and the names and addresses of all persons having a financial interest of 10 percent or more in the business and the percentage of financial interest owned by those persons.

"The application shall be accompanied by two sets of fingerprints of the applicant and affidavits of at least two reputable residents of the city or county in which the business of the talent agency is to be conducted who have known, or been associated with, the applicant for two years, that the applicant is a person of good moral character or, in the case of a corporation, has a reputation for fair dealing.

* * *

"1700.30. No talent agency shall sell, transfer, or give away to any person other than a director, officer, manager, employee, or shareholder of the talent agency any interest in or the right to participate in the profits of the talent agency without the written consent of the Labor Commissioner.

* * *

"1700.39. No talent agency shall divide fees with an employer, an agent or other employee of an employer." (Emphasis added.)

The term "fee" is defined in Section 1700.2, which reads, in pertinent part, as follows:

"1700.2. (a) As used in this chapter, 'fee' means any of the following:

"(1) Any money or other valuable consideration paid or promised to be paid for services rendered or to be rendered by any person conducting the business of a talent agency under this chapter.

"(2) Any money received by any person in excess of that which has been paid out by him or her for transportation, transfer of baggage, or board and lodging for any applicant for employment.

"(3) The difference between the amount of money received by any person who furnished employees, performers, or entertainers for circus, vaudeville, theatrical, or other entertainments, exhibitions, or performances, and the amount paid by him or her to the employee, performer, or entertainer.

* * *"

Thus, Chapter 4 requires a talent agent to disclose the identities of entities owning an interest, and the amount, in the talent agency, prohibits the transfer of interest without the written consent of the Labor Commissioner, and prohibits the division of fees.

The ATA Proposal implies that a company that is not a major studio or network, as specified, may own an interest in an agent (para. 2, ATA Proposal); purports to allow an agent to own less than a controlling interest, as defined, in a company engaged in production (para. 3, ATA Proposal), to allow a company that has an incidental interest in production to own an interest in an agent and an agent to own any interest in a company that has an incidental interest in production (para. 4, ATA Proposal), and to allow an agent to own any interest in a company engaged in distribution (para. 5, ATA Proposal); and contemplates the transfer of any interest of an agent to any interested company under certain conditions (para. 6, ATA Proposal). These provisions are contrary to Chapter 4, to the extent that they allow the sale, transfer, or giving away of any interest in or right to share the profits of the talent agency without the written consent of the Labor Commissioner (Sec. 1700.30), because the proposal does not require the written consent of the Labor Commissioner.

Moreover, Section 1700.39 prohibits a talent agency from dividing fees with an employer, an agent or other employee of an employer. Whether an agreement entered into under the ATA Proposal would constitute a division of fees would depend on all of the facts

and circumstances surrounding the agreement. Because we have not been provided with a specific agreement we cannot determine whether a prohibited division of fees would occur. However, a division of fees is prohibited by Section 1700.39 and the Labor Commissioner is without authority to approve such an arrangement. Thus, to the extent that the ATA Proposal purports to permit an agreement between a talent agency and an employer, an agent or other employee of an employer that would constitute a division of fees, the agreement would violate Chapter 4.

Accordingly, it is our opinion that to the extent that the ATA Proposal allows for or contemplates the sale, transfer, or giving away of interest in a talent agency, without the written consent of the Labor Commissioner, or allows a division of fees between a talent agency and an employer, an agent or the employee of an employer, it violates Chapter 4.

Very truly yours,

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